

E. Investment Arbitration

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THE CHALLENGE OF SOVEREIGNTY

When legal claims directly implicate public interests, the role of arbitration may be open to question. If challenges to environmental regulations or tax assessments create risks for general community welfare, an argument exists that resolution of such controversies should remain the prerogative of courts, rather than being surrendered to arbitrators.

To some extent, societal well-being can be jeopardized by any large arbitration, even if exclusively between private companies. A license dispute between two major pharmaceuticals might result in an award that affects prices paid by consumers. However, it is easier to become alarmed about infringement of national sovereignty when states become parties to arbitration, as happens increasingly under investment treaties.

As much an emotion as a legal construct,¹ sovereignty has probably been invoked ever since one ruler resisted attack from another, and the aggressor felt bound to give reasons (good or bad) to justify the invasion.² Derived from the Latin *super*, meaning “above,” sovereignty in the context of international relations normally implicates a state’s right to exercise supreme power within its territory.³

¹ See Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 Stanford J. Int’l Law 195 (2004). Professor Radon begins by describing sovereignty as a “term in search of a definition.”

² For two classic treatises on the subject, see Bertrand de Jouvenel, *De la souveraineté: à la recherche du bien pratique* (1947) (transl. J.F. Huntington, 1957, as *Sovereignty: An Inquiry Into the Political Good*); Jean Bodin, *La République* (1576) (Livre I, Ch. 10) (transl. Richard Knolles, 1606, as *The Six Books of a Commonwealth*, reprinted by Harvard University Press, 1962, Kenneth McRae, ed.).

³ The terms sovereignty has been used in other contexts, of course, including as a description of a political subdivision’s autonomy on certain matters. For another view of sovereignty, see generally W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in *Democratic Governance and International Law* 239 (G. Fox and B. Roth, eds., 2000), exploring sovereignty of populations in contrast to that of rulers. See also Stephen D. Krasner, *Globalization and Sovereignty*, in *States and Sovereignty in the Global Economy* (D. Smith, D. Solinger, & S. Topik, eds., 1999).

Challenge to sovereignty by reason of competing adjudicatory regimes is not new. One remembers that the right to dissolve a marriage in England traditionally lay in Rome rather than with English courts, a state of affairs found highly unsatisfactory by Henry VIII when he wished to divorce the unfortunate Catherine of Aragón in order to marry the even more unfortunate Anne Boleyn. Not until 1533 were Henry's own judges given ultimate jurisdiction over religious causes of action.⁴

Modern concepts of sovereignty came sharply into focus during the years immediately following the Protestant Reformation. During the wars of religion that plagued Europe in the sixteenth and seventeenth centuries, military intervention in the territory of a neighbor was often justified as protection of a victimized religious community. Catholic armies invaded Lutheran principalities to protect mistreated Catholics, while Lutheran princes entered Catholic lands to defend persecuted Lutherans.

An early articulation of sovereignty can be found in the 1555 treaty signed in the Bavarian city of Augsburg which ended some of the religious bloodshed through a public peace (*Landfriede*) within the Holy Roman Empire.⁵ Based on the tenet that no estate could intervene in another on religious grounds,⁶ the treaty established a principle later summarized as *cujus regio, ejus religio*: whoever rules, his is the religion.⁷

Sometimes articulated as “the religion of the prince is the religion of the state,” this rule can sound harsh to modern ears. In its historical context, however, by its implementation Europe took a small step toward religious liberty, by denying the right to impose faith by force in a foreign territory.

The resulting sphere of autonomy ultimately extended to secular as well as religious matters.⁸ In 1648, this principle was confirmed in the Treaties of Münster and Osnabrück which brought an end to the Thirty Years War, resulting in the so-called Peace of

⁴ The Act for the Restraint of Appeals 1533 provided that any “spiritual” cause of action should be decided in courts within the jurisdiction of the King of England. The English monarch's jurisdiction over the Church of England (as the supreme head on Earth) was established in the Act of Supremacy, 26 Hen. VII c. 1 (1534), reaffirmed I Eliz. c. 1 (1559), which extinguished the “usurped foreign power” of papal jurisdiction. See generally John H. Baker, VI *Oxford History of the Laws of England* 244–251 (2003); Henry A. Kelly, *The Matrimonial Trials of Henry VIII* (1976).

⁵ In France people were not so lucky. It took another forty-three years (and the bloody St. Bartholomew's Day Massacre) before Henry IV issued the Edict of Nantes, granting a measure of autonomy to French Calvinists. Then in 1685 Louis XIV revoked the Edict, driving many Huguenots into exile. Since French Calvinists remained royal subjects, few real analogies exist between the Edict of Nantes and the Peace of Augsburg. See generally Roland Mousnier, *L'Assassinat d'Henri IV* (1964) at 122–142; François Bayrou, *Ils portaient l'écharpe blanche* (1998), at 105–194.

⁶ See Articles 2, 3, and 10 of Religious Peace of Augsburg (*Augsburger Religionsfriede*), signed 25 September 1555 (Julian Calendar). Lutherans and Catholics were the only religious groups protected. German text in Jean Dumont, IV *Corps universel diplomatique du droit des gens* 88 (1726–31). English translation in *Church and State through the Centuries* 166 et seq. (Sidney Ehler & John Morrall, eds., 1954).

⁷ Although the operation of this principle was found in both the Peace of Augsburg and the Peace of Westphalia, it was first formulated as such only years later by the Swiss jurist Emerich de Vattel, in *Droit des gens, Ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, Ch. 4 § 54 (1758).

⁸ See generally, Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, 25 Michigan J. Int'l L. 981 (2004).

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Westphalia.⁹ The treaties established an international regime whereby for each territory a single authority exerted ultimate political and religious power.¹⁰

The chapters that follow explore some of the wrinkles of law and policy when sovereignty and arbitration collide. Policy debates about arbitration of investment disputes have proven to be particularly challenging.

⁹ The Thirty Years War saw Catholic France and Protestant Sweden allied against the Holy Roman Empire. Both executed on 24 October 1648, the treaty of Münster bound the King of France, while a companion treaty with Sweden was signed at Osnabrück. See 1 *Consolidated Treaty Series* at 273 (Latin text) and 319 (English version) (Treaty of Münster) and 1 *Consolidated Treaty Series* 121 (Latin text) and 198 (English version) (for the Treaty of Osnabrück).

¹⁰ It is somewhat surprising that neither Jean Bodin nor Bertrand de Jouvenel (cited *supra*) pay much attention to the impact which the wars of religion had on the development of sovereignty notions. For Bodin, the answer might lie in the fact that historical perspective was lacking, since the wars were ongoing during his life, and the Treaty of Augsburg antedated his work on sovereignty by only two decades. For de Jourvenel, the lacuna is more puzzling. On the evolution of concepts of sovereignty linked to status of individuals rather than territory, see Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (2000).

